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APR 10 2007

OFFICE OF PETITIONS

In re Application of
PAUL DOUGLAS BYRD
Application No. 09/822,475
Filed: March 29, 2001
Attorney Docket No. n/a

DECISION ON PETITION

This is a decision on the RENEWED petition under the unavoidable provisions of 37 CFR 1.137(a), filed May 22, 2006, to revive the above-identified application.

The petition is **DISMISSED**.

Any further petition to revive must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is not a final agency action within the meaning of 5 U.S.C. § 704.

The application became abandoned for failure to timely reply within the meaning of 37 CFR 1.113 to the final Office action, mailed September 28, 2004, which set a shortened statutory period for reply of three (3) months. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, the application became abandoned on December 29, 2004. A Notice of Abandonment was mailed on June 1, 2005.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). **The instant petition lacks items (1) and (3).**

Regarding item (1) the required reply:

The application became abandoned for failure to timely file a reply within the meaning of 37 CFR 1.113 to the final Office action of September 28, 2004. The proposed reply required for consideration of a petition to revive must be a Notice of Appeal (and appeal fee required by 37

CFR 41.20(b)(2), an amendment that *prima facie* places the application in condition for allowance, a Request for Continued Examination and submission (37 CFR 1.114), or the filing of a continuing application under 37 CFR 1.53(b). See MPEP 711.03(c)(II)(A)(2).

The petition is not accompanied by the required reply.

If petitioner lacks the requisite knowledge of patent prosecution to prepare an acceptable response to continue prosecution in this finally rejected application, he is strongly urged to obtain the services of a registered practitioner i.e., an attorney or agent registered to practice before the USPTO, to assist in preparation of the reply, and possibly, any renewed petition. USPTO employees are prohibited from assisting petitioner in the prosecution of this application, or aid in the selection of a registered practitioner. Petitioner may also obtain information from the PTO Internet web site at: www.uspto.gov, including a list of all registered practitioners, or by calling the Patent Assistance Center during the normal business hours for the eastern U.S. at 1-800-786-9199. Again, the PTO cannot prosecute his or any other application on behalf of an applicant.

Regarding item (3) a showing that the delay was unavoidable:

Petitioner states that incapacitation and rehabilitation due to a spinal cord stroke injury on October 25, 2004 caused the application to become abandoned for failure to timely file a response to the final Office action of September 28, 2004. Petitioner was an inpatient at the North Texas Veterans Hospital in Dallas on the date of abandonment and is currently wheel chair bound and dealing with the rigors of being a paraplegic.

Petitioner submitted as evidence a letter by Melvin Mejia, MD, SCI Staff Physician at Department of Veterans Affairs North Texas Health Care System dated December 14, 2004 that Mr. Byrd was hospitalized since October 25, 2004 for a new spinal cord injury and would be an inpatient for several more weeks along with another letter (undated) that Mr. Byrd required outpatient rehabilitation.

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

A showing of "unavoidable" delay based upon incapacitation must establish that petitioner's incapacitation was of such nature and degree as to render petitioner unable to conduct business (e.g., correspond with the Office) during the period between September 28, 2004 and September 14, 2005. Such a showing must be supported by a statement from the petitioner's treating physician and the statement must provide the nature and degree of petitioner's incapacitation during this above-mentioned period. He will have to provide documents from licensed health care providers, demonstrating the nature and extent of petitioner's incapacitation; in such a manner that petitioner was, "unavoidably" prevented from taking any earlier action with respect to this application. Additionally, petitioner must state how he manages to conduct his daily personal and business affairs, including scheduling and settlement of short and long term debts and business obligations, bills, rent or mortgage payments, income taxes etc., during the time in question.

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). There is no evidence of record that petitioner was incapacitated to the extent he could not conduct his regular business throughout the entire period when a response could have been filed. This is supported by the fact that the petitioner was aware of his patent application and did send communications to the USPTO in regard to his patent application on December 22, 2004 and on April 25, 2005. The communication on December 22, 2004 stated that he had been hospitalized due to a spinal cord injury on October 25, 2004 and will be unable to respond to the office action and requested a continuation of six month for his recovery from the injury. No extensions of time were purchased. On April 25, 2005, after the maximum extendable period for reply, petitioner further submitted a rewritten set of claims. After the Notice of Abandonment was mailed on June 1, 2005, petitioner replied with a petition for revival of an abandoned unavoidably under 37 CFR 1.137(a) on September 14, 2005.

The request on December 22, 2004 for a continuation of resolution for six months by petitioner due to his injury was not proper and not accepted because any such request to extend the time period for reply under 37 CFR 1.136(a) is limited by maximum period set by statute which is six months from the mail date of the office Action and **must** be accompanied by the required fee set forth in 37 CFR 1.17(a). No fee for the extension of time was filed in the application, and therefore any timely reply must be filed prior to December 28, 2004 or else the application becomes abandoned on December 29, 2004. The applicant's communications on December 22, 2004 and April 25, 2005 were not proper replies which would continue the application or avoid abandonment.

A delay resulting from the lack of knowledge or improper application of the patent statute, rules of practice or the MPEP does not constitute an “unavoidable” delay. *See Haines v. Quigg*, 673 F. Supp. 314, 317, 5 USPQ2d 1130, 1132 (N.D. Ind. 1987), *Vincent v. Mossinghoff*, 230 USPQ 621, 624 (D.D.C. 1985); *Smith v. Diamond*, 209 USPQ 1091 (D.D.C. 1981); *Potter v. Dann*, 201 USPQ 574 (D.D.C. 1978); *Ex parte Murray*, 1891 Dec. Comm'r Pat. 130, 131 (1891). A delay caused by an applicant’s lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered “unavoidable” due to: (1) the applicant’s reliance upon oral advice from Office employees; or (2) the Office’s failure to advise the applicant of any deficiency in sufficient time to permit the applicant to take corrective action. *See In re Sivertz*, 227 USPQ 255, 256 (Comm'r Pat. 1985); *see also In re Colombo, Inc.*, 33 USPQ2d 1530, 1532 (Comm'r Pat. 1994) (while the Office attempts to notify applicants of deficiencies in their responses in a manner permitting a timely correction, the Office has no obligation to notify parties of deficiencies in their responses in a manner permitting a timely correction).

Petitioner/applicant is cautioned to avoid submitting personal information in documents filed in a patent application that may contribute to identity theft. Personal information such as social security numbers, bank account numbers, or credit card numbers (other than a check or credit card authorization form PTO-2038 submitted for payment purposes) is never required by the USPTO to support a petition or an application. If this type of personal information is included in documents submitted to the USPTO, petitioners/applicants should consider redacting such personal information from the documents before submitting them to the USPTO. Petitioner/applicant is advised that the record of a patent application is available to the public after publication of the application (unless a non-publication request in compliance with 37 CFR 1.213(a) is made in the application) or issuance of a patent. Furthermore, the record from an abandoned application may also be available to the public if the application is referenced in a published application or an issued patent (see 37 CFR 1.14). Checks and credit card authorization forms PTO-2038 submitted for payment purposes are not retained in the application file and therefore are not publicly available.

Alternative venue

The petition under 37 CFR 1.137(a) to revive an abandoned application “unavoidably” cannot be granted. If petitioner cannot provide the evidence necessary to establish unavoidable delay, or simply does not wish to, petitioner may wish to consider filing a petition stating that the delay was unintentional. Public Law 97-247, § 3; 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an “unintentionally” abandoned application without a showing that the delay in prosecution or in late payment of the issue fee was “unavoidable.” This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An “unintentional” petition under 37 CFR 1.137(b) must be accompanied by the \$1,500 (or \$750 for Small Entity Status) petition fee. The attached PTO/SB/64 form may be used to file the petition for revival of an application abandoned unintentionally under 37 CFR 1.137(b).

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a

statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By Mail: Mail Stop PETITION
 Commissioner for Patents
 P. O. Box 1450
 Alexandria, VA 22313-1450

By hand: U. S. Patent and Trademark Office
 Customer Service Window, Mail Stop Petitions
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

By facsimile: (571) 273-8300
 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to Amelia Au at (571) 272-7414.


Brian Hearn
Petitions Examiner
Office of Petitions

Attachment: PTO/SB/64 form

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

PETITION FOR REVIVAL OF AN APPLICATION FOR PATENT ABANDONED UNINTENTIONALLY UNDER 37 CFR 1.137(b)	Docket Number (Optional)
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First named inventor:

Application No.:

Art Unit:

Filed:

Examiner:

Title:

Attention: Office of Petitions
Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450
 FAX (571) 273-8300

NOTE: If information or assistance is needed in completing this form, please contact Petitions Information at (571) 272-3282.

The above-identified application became abandoned for failure to file a timely and proper reply to a notice or action by the United States Patent and Trademark Office. The date of abandonment is the day after the expiration date of the period set for reply in the office notice or action plus an extensions of time actually obtained.

APPLICANT HEREBY PETITIONS FOR REVIVAL OF THIS APPLICATION

NOTE: A grantable petition requires the following items:

- (1) Petition fee;
- (2) Reply and/or issue fee;
- (3) Terminal disclaimer with disclaimer fee - required for all utility and plant applications filed before June 8, 1995; and for all design applications; and
- (4) Statement that the entire delay was unintentional.

1. Petition fee

Small entity-fee \$ _____ (37 CFR 1.17(m)). Applicant claims small entity status. See 37 CFR 1.27.

Other than small entity – fee \$ _____ (37 CFR 1.17(m))

2. Reply and/or fee

- A. The reply and/or fee to the above-noted Office action in the form of _____ (identify type of reply):

has been filed previously on _____.
 is enclosed herewith.

- B. The issue fee and publication fee (if applicable) of \$ _____.
 has been paid previously on _____.
 is enclosed herewith.

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This collection of information is required by 37 CFR 1.137(b). The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 1.0 hour to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

3. Terminal disclaimer with disclaimer fee

- Since this utility/plant application was filed on or after June 8, 1995, no terminal disclaimer is required.
- A terminal disclaimer (and disclaimer fee (37 CFR 1.20(d)) of \$ _____ for a small entity or \$ _____ for other than a small entity) disclaiming the required period of time is enclosed herewith (see PTO/SB/63).

4. STATEMENT: The entire delay in filing the required reply from the due date for the required reply until the filing of a grantable petition under 37 CFR 1.137(b) was unintentional. [NOTE: The United States Patent and Trademark Office may require additional information if there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137(b) was unintentional (MPEP 711.03(c), subsections (III)(C) and (D)).]

WARNING:

Petitioner/applicant is cautioned to avoid submitting personal information in documents filed in a patent application that may contribute to identity theft. Personal information such as social security numbers, bank account numbers, or credit card numbers (other than a check or credit card authorization form PTO-2038 submitted for payment purposes) is never required by the USPTO to support a petition or an application. If this type of personal information is included in documents submitted to the USPTO, petitioners/applicants should consider redacting such personal information from the documents before submitting them to the USPTO. Petitioner/applicant is advised that the record of a patent application is available to the public after publication of the application (unless a non-publication request in compliance with 37 CFR 1.213(a) is made in the application) or issuance of a patent. Furthermore, the record from an abandoned application may also be available to the public if the application is referenced in a published application or an issued patent (see 37 CFR 1.14). Checks and credit card authorization forms PTO-2038 submitted for payment purposes are not retained in the application file and therefore are not publicly available.

Signature

Date

Typed or printed name

Registration Number, if applicable

Address

Telephone Number

Address

Enclosures: Fee Payment Reply Terminal Disclaimer Form Additional sheets containing statements establishing unintentional delay Other: _____**CERTIFICATE OF MAILING OR TRANSMISSION [37 CFR 1.8(a)]**

I hereby certify that this correspondence is being:

- Deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: Mail Stop Petition, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450.
- Transmitted by facsimile on the date shown below to the United States Patent and Trademark Office at (571) 273-8300.

Date

Signature

Typed or printed name of person signing certificate

Privacy Act Statement

The Privacy Act of 1974 (P.L. 93-579) requires that you be given certain information in connection with your submission of the attached form related to a patent application or patent. Accordingly, pursuant to the requirements of the Act, please be advised that: (1) the general authority for the collection of this information is 35 U.S.C. 2(b)(2); (2) furnishing of the information solicited is voluntary; and (3) the principal purpose for which the information is used by the U.S. Patent and Trademark Office is to process and/or examine your submission related to a patent application or patent. If you do not furnish the requested information, the U.S. Patent and Trademark Office may not be able to process and/or examine your submission, which may result in termination of proceedings or abandonment of the application or expiration of the patent.

The information provided by you in this form will be subject to the following routine uses:

1. The information on this form will be treated confidentially to the extent allowed under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C 552a). Records from this system of records may be disclosed to the Department of Justice to determine whether disclosure of these records is required by the Freedom of Information Act.
2. A record from this system of records may be disclosed, as a routine use, in the course of presenting evidence to a court, magistrate, or administrative tribunal, including disclosures to opposing counsel in the course of settlement negotiations.
3. A record in this system of records may be disclosed, as a routine use, to a Member of Congress submitting a request involving an individual, to whom the record pertains, when the individual has requested assistance from the Member with respect to the subject matter of the record.
4. A record in this system of records may be disclosed, as a routine use, to a contractor of the Agency having need for the information in order to perform a contract. Recipients of information shall be required to comply with the requirements of the Privacy Act of 1974, as amended, pursuant to 5 U.S.C. 552a(m).
5. A record related to an International Application filed under the Patent Cooperation Treaty in this system of records may be disclosed, as a routine use, to the International Bureau of the World Intellectual Property Organization, pursuant to the Patent Cooperation Treaty.
6. A record in this system of records may be disclosed, as a routine use, to another federal agency for purposes of National Security review (35 U.S.C. 181) and for review pursuant to the Atomic Energy Act (42 U.S.C. 218(c)).
7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.
8. A record from this system of records may be disclosed, as a routine use, to the public after either publication of the application pursuant to 35 U.S.C. 122(b) or issuance of a patent pursuant to 35 U.S.C. 151. Further, a record may be disclosed, subject to the limitations of 37 CFR 1.14, as a routine use, to the public if the record was filed in an application which became abandoned or in which the proceedings were terminated and which application is referenced by either a published application, an application open to public inspection or an issued patent.
9. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local law enforcement agency, if the USPTO becomes aware of a violation or potential violation of law or regulation.